

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of
Telecommunications and Energy on its own motion
pursuant to G.L. c. 159, §§ 12 and 16 into Verizon
New England, Inc. d/b/a Verizon Massachusetts'
provision of Special Access Services

DTE 01-34

**INITIAL BRIEF OF
AT&T COMMUNICATIONS OF NEW ENGLAND, INC.**

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Glossary of Acronyms

<u>Term</u>	<u>Definition</u>
ASR	Access Service Request
CATC	Carrier Account Team Center
CDDD	Customer Desired Due Date
CLEC	Competitive Local Exchange Carrier
CNR	Customer Not Ready
CPE	Customer Premises Equipment
EEL	Enhanced Extended Link
FCC	Federal Communications Commission
FOC	Firm Order Commitment
ILEC	Incumbent Local Exchange Carrier
I-Report	Installation Report of trouble in first 30 days
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
NYPSC	New York Public Service Commission
PAP	Performance Assurance Plan
POP	Point of Presence
RR	Record Request
UNE	Unbundled Network Element

Short Names for Key Cases and Regulatory Decisions

<u>Short Form</u>	<u>Long Form</u>
<i>D.P.U. 90-133</i>	<i>AT&T Communications of New England, Inc., D.P.U. 90-133 (1991)</i>
<i>D.P.U. 94-50</i>	<i>Petition of New England Telephone and Telegraph Company d/b/a NYNEX for an Alternative Regulatory Plan for the Company's Massachusetts intrastate telecommunications services, Order, D.P.U. 94-50 (May 12, 1995)</i>
<i>D.T.E. 01-31 Phase I Order</i>	<i>Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to Success Price Cap Regulation for Verizon New England, Inc d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts, Order, D.T.E. 01-31-Phase I (May 8, 2002)</i>

Short Form

*IntraLATA
Competition Order*

*NYPSC June 15, 2001,
Order*

*NYPSC December 20,
2001, Order*

*Pricing Flexibility
Order*

Long Form

*Petition of the Attorney General for a Generic Adjudicatory
Proceeding Concerning Intrastate Competition by Common Carriers in
the Transmission of Intelligence by Electricity, Specifically with
Respect to Intra-LATA Competition, and Related Issues, D.P.U. 1731
(1985)*

*Proceeding on Motion of the Commission to Investigate Methods to
Improve and Maintain High Quality Special Services Performance by
Verizon New York Inc., NYPSC Case 00-C-2051, Opinion and Order
Modifying Special Services Guidelines for Verizon New York Inc.,
Conforming Tariff, and Requiring Additional Performance Reporting
(June 15, 2001)*

*Proceeding on Motion of the Commission to Investigate Methods to
Improve and Maintain High Quality Special Services Performance by
Verizon New York Inc., NYPSC Case 00-C-2051, Order Denying
Petitions for Rehearing and Clarifying Applicability of Special Services
Guidelines (December 20, 2001)*

*Access Charge Reform; Price Cap Performance Review for Local
Exchange Carriers; Interexchange Carrier Purchases of Switched
Access Services Offered by Competitive Local Exchange Carriers;
Petition of U S West Communications, Inc. for Forbearance from
Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, FCC
99-206, Fifth Report and Order, 14 FCC Rcd 14221 (1999) ("Pricing
Flexibility Order"), *aff'd sub nom., WorldCom, Inc. v. FCC*, 238 F.3d
449 (D.C. Cir. 2001).*

INTRODUCTION AND SUMMARY.

*“...the DS-1 that we all use to provide our various services, that’s what at the heart of the matter here: How long does it take all of us to get that DS-1...?”*¹

As Ms. Halloran succinctly stated in her oral testimony, this case is about the ability of Verizon’s competitors to obtain special access circuits from Verizon to provide various telecommunications services that compete with Verizon’s services. The advantage over its competitors that Verizon enjoys by controlling the circuits necessary for all carriers to compete cannot be overstated. In D.T.E. 01-31, the Department recognized the need to prevent Verizon from exploiting its control over these essential inputs in an effort to gain an unfair advantage over its competitors in retail markets. In that case, the Department required Verizon to price the special access circuits its rivals need to compete at the same cost Verizon incurs to provide the retail service.² The Department also made clear that, if it finds in the current proceeding that Verizon discriminates against its rivals in the provisioning of these inputs, the Department would implement the penalties and requirements necessary to ensure non-discriminatory provisioning.³ The record in this case is clear: Verizon discriminates against its rivals in the provision of special access circuits. Accordingly, in order to guarantee fair competition and reasonable prices in the retail markets that rely on Verizon for special access circuits, the Department should institute performance assurance metrics and remedies to ensure that Verizon’s rivals have non-discriminatory access. The Department should also order the other critical corrective measures described in the testimony of AT&T witness Eileen Halloran and below.

¹ Tr. 432, 5/30/02 (Halloran).

² D.T.E. 01-31 Phase I Order, at 62-63.

³ D.T.E. 01-31 Phase I Order, at 65.

The Department instituted this proceeding “to determine through presentation of evidence: (1) whether Verizon’s special access services are unreasonable under G.L. c. 159, § 16; and (2) if so, what steps Verizon should be required to take to improve its special access services.”⁴ AT&T and WorldCom presented: (a) statistical evidence that Verizon provides faster and more reliable service to its retail customers than to wholesale carrier customers,⁵ and (b) evidence of actual, real-world incidents corroborating the statistical evidence.⁶ In contrast, Verizon has offered no evidence to show that its special access performance is not discriminatory.

Instead of presenting hard data, Verizon offered two reasons why the Department should not regulate Verizon’s provisioning of special access circuits to wholesale carrier customers. First, Verizon claimed that “competition” in the special access market obviates the need for special access performance measurements and penalties.⁷ In this proceeding, Verizon has presented no evidence to demonstrate the presence of competition in the special access market. Instead, Verizon has relied on the same evidence that it presented in D.T.E. 01-31 (Phase I) to assert that competition exists and is sufficient to impose performance discipline. Importantly, however, Verizon’s arguments on the level of competition already have been considered and rejected by the Department in D.T.E. 01-31. In short, the Department already has rejected Verizon’s claim that the special access market is competitive and not subject to market

⁴ Vote and Order to Open Investigation, D.T.E. 01-34 (March 14, 2001), at 3.

⁵ See *Halloran Surrebuttal*, at 11 (updated in Ex. ATT-7), 13 (updated at Tr. 369-371, 5/30/02), and 18 (updated at RR-AG-1).

⁶ See *Halloran Direct*, at 10, WorldCom’s Ms. Furbish attaches to her Direct Testimony the Declaration of Eric Gillenwater which “details the ease with which Verizon was able to provision retail circuits directly to Bloomberg, even though (a) Verizon took months to provision identical circuits to Bloomberg on behalf of WorldCom, and (b) each of the Verizon retail orders was placed after the corresponding orders by WorldCom.” *Furbish Direct*, at 10 and Attachment C.

⁷ *Verizon MA Panel Testimony (Corrected)*, March 19, 2002 (“*Verizon Testimony*”), at 1.

dominance by Verizon,⁸ and Verizon has presented no additional evidence in this proceeding to change that finding.

Moreover, the New York Public Service Commission also has rejected Verizon-New York's arguments on the performance-disciplining impact of special access competition after an investigation of Verizon's special access performance in what is generally considered the most competitive market in the United States (southern Manhattan).⁹ The NYPSC determined that:

Verizon's data, as well as the advantages attendant upon its historical incumbent position, indicate it continues to occupy the dominant position in the Special Services market, and [] its dominance is a controlling factor in the market. Because competitors rely on Verizon's facilities, particularly its local loops, Verizon represents a bottleneck to the development of a healthy, competitive market for Special Services.¹⁰

The record in this case shows without question that the same can be said for Massachusetts.

Second, in an attempt to cast doubt upon the results showing clear discrimination, Verizon claims that "process differences" prevent comparison of retail and wholesale data. With these alleged process differences, Verizon attempts to explain away the marked disparity between the speed and quality of special access performance it provides to its own end users compared to that which it provides to its wholesale carrier customers, as shown in Ms. Halloran's testimony.¹¹ Ms. Halloran, however, demonstrates how simple and straight-forward it is to make the adjustments necessary to permit an "apples-to-apples" comparison of wholesale and retail data. Even after these adjustments are made, the hard numbers continue to support the

⁸ *D.T.E. 01-31 Phase I Order*, at 62.

⁹ *See Halloran Direct*, at 5.

¹⁰ *NYPSC June 15, 2001, Order*, at 9. In its December 20, 2001, Order Denying Petitions for Rehearing and Clarifying Applicability of Special Service Guidelines, the NYPSC reaffirmed its finding of no competition based on August 2001 data which corroborated the earlier finding of Verizon dominance, showing that "Verizon serves over 79.5% of the statewide market..." *NYPSC December 20, 2001, Order*, at 10.

¹¹ *See Halloran Surrebuttal*, at 11 (updated in Ex. ATT-7), 13 (updated at Tr. 369-371, 5/30/02), and 18 (updated at RR-AG-1).

inescapable conclusion that Verizon's performance is better for its retail customers than for its wholesale carrier customers.

Here again, Verizon's assertions of "process differences" were found to be unpersuasive by the NYPSC. Verizon presented to the NYPSC process flow charts and process arguments similar to those presented in this case in an attempt to show that wholesale and retail data cannot be compared.¹² The NYPSC rejected Verizon's process arguments, stating:

The data...suggest that Verizon treats other carriers less favorably than its retail customers. On average, it meets only 74% of its appointments on carrier service requests, but meets 94% of its retail customer appointments.[] Verizon's explanation for this disparity is that it attempts to renegotiate appointments when necessary, and is more successful in changing appointments with retail customers. Verizon asserts it does not count renegotiated appointments as missed appointments and thus its retail performance appears better than its carrier performance. Verizon denies discrimination, but provides no data to explain the 20% difference in performance or to refute the prima facie indicia of discrimination.¹³

Based on the evidence presented by AT&T and WorldCom on Verizon's performance in Massachusetts, the Department similarly should reject Verizon's claim that process differences, supported by absolutely no data, prevent a finding that Verizon treats its own customers more favorably than Verizon treats wholesale carrier customers.

Thus, the Department's first line of inquiry has been satisfied: Verizon's special access performance discriminates against wholesale carrier customers and, therefore, is unreasonable. Next, the Department must determine the most effective means of preventing this discrimination and remedying it where it continues. Regulation and oversight are critical to ensure that Verizon, the dominant provider of special access services, cannot use its control of bottleneck facilities to prevent effective competition in Massachusetts.

¹² Tr. 396-398, 5/30/02 (Halloran).

¹³ *NYPSC June 15, 2001, Order*, at 5-6.

As a first step, the Department should establish metrics and standards to measure and monitor on a continuing basis the adequacy of Verizon's intrastate and interstate special access performance. Second, the Department should institute a performance assurance plan with financial incentives for intrastate access performance. Third, based upon the year to date interstate and intrastate 2002 results reported in this proceeding, the Department immediately should institute a Phase II of this proceeding to require Verizon to undertake a detailed root cause analysis to determine the causes of the discrimination and deficient performance. Fourth, based upon that root cause analysis, the Department should make specific findings and order Verizon to make immediate and long term changes to its infrastructure and processes and to increase the resources used to provide and maintain special access circuits to wholesale carrier customers. Fifth, upon investigation in Phase II of D.T.E. 01-31, the Department should order Verizon to remove the UNE/EELs use restrictions and artificial UNE "no facilities" barriers so that carriers can obtain the facilities and the performance they need to compete in the local exchange market pursuant to the existing performance assurance plan applicable to UNEs.

The Department already has recognized that "as a vertically integrated firm, Verizon has an incentive to discriminate in the provisioning and maintenance of wholesale services."¹⁴ Verizon's incentive to discriminate in favor of its own retail customers will only increase as Verizon aims to increase its market share resulting from the FCC's grant of interLATA authority. The impact of Section 271 approval on Verizon's incentive to discriminate in special access provisioning is huge: AT&T must now purchase circuits from its direct competitor in order to offer competing services to customers.¹⁵ In New York, Section 271 approval resulted in

¹⁴ *D.T.E. 01-31 Phase I Order*, at 64.

¹⁵ See e.g., RR-WCOM-1 (Cannell) (Verizon end-user customers may obtain virtual private network services across LATA boundaries (inter and intra) through a combination of Verizon entities).

degradation of Verizon's special access performance to competitors.¹⁶ To mitigate and reduce Verizon's incentive to discriminate in Massachusetts, regulation by the Department is crucial. Without the measures described above, retail competition in the business services market will fail, and Massachusetts business customers will continue to be frustrated and dissatisfied.

ARGUMENT.

I. IT IS UNDISPUTED THAT VERIZON IS A DOMINANT CARRIER IN THE SPECIAL ACCESS MARKET AND REQUIRES REGULATION TO CONTROL ITS MARKET POWER.

Verizon asks the Department not to regulate its special access performance on the ground that "competition" in the special access market will cause Verizon to provide nondiscriminatory service to wholesale and retail customers.¹⁷ This flies in the face of reality. The experience of competitive carriers in Massachusetts, and the data presented by AT&T in this case, vividly show that the current level of competition is wholly insufficient to impose wholesale performance discipline on Verizon.

Moreover, Verizon's position ignores Department precedent. Under Department rulings, regulation is required for "dominant" carriers, while non-dominant carriers are presumed to be disciplined by market forces and to have no ability to exercise market power.¹⁸ Verizon is a dominant carrier. Prior to this case, Verizon's access rates and end-user retail rates had been regulated based on the premise that Verizon had monopoly power in those markets (rate of return regulation prior to 1995 and then price cap regulation after 1995, pursuant to D.P.U. 94-50). In D.T.E. 01-31, Verizon sought to demonstrate that the market for special access services is a competitive market in which Verizon does not have market power. The Department clearly

¹⁶ See *Furbish Direct*, at 10-11 (citing the *NYPSC December 20, 2001, Order*, at 10).

¹⁷ *Verizon Testimony*, at 13.

¹⁸ *D.T.E. 01-31 Phase I Order*, at 20, citing *IntraLATA Competition Order*, at 64.

rejected Verizon's contention, leaving in place Verizon's status as a dominant carrier in the provision of special access.¹⁹

While Verizon has repeated its contention in this case that the special access market is competitive and, by implication, that Verizon is a non-dominant carrier in the special access market, the only argument and evidence Verizon presented here is the same argument and evidence it presented in D.T.E. 01-31, *i.e.*, the Massachusetts Competitive Profile, and the FCC rulings regarding special access. AT&T, however, has presented further evidence in this case of Verizon's dominance and power in the market for special access. Since the Department has already stated that it is not persuaded by the same evidence Verizon presents in this proceeding and since AT&T offers additional evidence of Verizon's market dominance, the Department's Phase I Order in D.T.E. 01-31 is dispositive on the issue here: Verizon remains a dominant carrier in the provision of special access, and Verizon can and should be regulated as needed to control its market power. The details of AT&T's argument are set forth below.

A. The Department Already Has Found in D.T.E. 01-31, Based on the Same Evidence Presented by Verizon in This Proceeding, That the Special Access Market Is Not Competitive.

In this proceeding, with the exception of uninformed opinions of lay witnesses who were ignorant of the Department's standards for determining market power,²⁰ Verizon has offered no evidence beyond that which it offered in D.T.E. 01-31: the Massachusetts Competitive Profile²¹

¹⁹ D.T.E. 01-31 Phase I Order, at 62.

²⁰ Tr. 131, 133-134, 5/28/02 (Umland, Holland, McFeely, Connell).

²¹ Verizon's reliance on the Massachusetts Competitive Profile to prove competition in the *wholesale*, special access market is wholly inappropriate. *See Verizon Testimony*, at 13. The Massachusetts Competitive Profile purports to be a database of *retail* services and lines; it does *not* purport to describe over what facilities those retail services are provided. Indeed, one of the major issues in D.T.E. 01-31 related to the inability of Verizon to determine the nature of the facilities over which the competitive services and lines were provided. *See D.T.E. 01-31 Phase I Order*, at 82 ("Verizon cannot separate out full-facilities-based data from the partial-facilities-based data in the E911 database...").

(continued...)

and FCC rulings on pricing flexibility.²² At the outset, it should be noted that the Department already has considered and rejected this evidence as a basis for finding that Verizon is a non-dominant provider of access. The Department stated:

Verizon has not adequately supported its claim that the special access market is competitive on a state-wide basis. Therefore, the Department concludes that the supply elasticity for private line services (Verizon's retail and CLECs' special access services) has not been proven to be high enough to permit granting Verizon's request [for deregulation of private line services].²³

It makes no sense for Verizon to argue for a different finding in this case, when it has presented no additional evidence in its favor. In short, Verizon's position would have the Department issue a finding on competition contradictory to the Department's conclusions in D.T.E. 01-31, and this would clearly violate the reasoned consistency doctrine.²⁴

Nor can the one assertion that Verizon provided in this case beyond what was provided in D.T.E. 01-31 constitute substantial evidence that could warrant the Department's reversing its decision in D.T.E. 01-31. Offering no analysis and no data, four Verizon witnesses, none of whom have a degree in economics, offered their personal opinion that the special access market

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The Massachusetts Competitive Profile, thus, provides no evidence supporting a Verizon claim that it is not a dominant provider of special access circuits in the *wholesale* market. See *D.T.E. 01-31 Phase I Order*, at 69-70 ("...the Department concludes that for resellers, UNE-P, and UNE-L providers, the supply elasticity of the business local exchange market (except for private line services) is high and that the market is contestable. However, the Department also concludes that full and partial-facilities-based providers, that use their own loops, do not operate in a contestable market and have less supply elasticity.")

²² *Verizon Testimony*, at 9-12.

²³ *D.T.E. 01-31 Phase I Order*, at 62.

²⁴ *Boston Gas Co. v. Department of Public Utilities*, 367 Mass. 92, 104 (1975) ("A party to a proceeding before a regulatory agency such as the Department has a right to expect and obtain reasoned consistency in the agency's decisions. This does not mean that every decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decision constituting res judicata, but neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time it is presented.")

is “highly competitive.”²⁵ Yet, not a single witness could address whether the competition they claim to have observed is sufficient to conclude that Verizon lacks market power. Indeed, the Verizon witnesses did not even know how economists define the term “market power.”²⁶ Most important, however, is the fact that whatever criteria Verizon’s witnesses used for determining whether Verizon has market power, it is not the Department’s criteria.²⁷ No weight, therefore, can be given to the Verizon witnesses’ opinion that there is competition in the special access market sufficient to eliminate Verizon’s market power.

B. FCC Grant of Pricing Flexibility Does Not Demonstrate Verizon’s Non-Dominance in the Special Access Market.

As it did in D.T.E. 01-31, Verizon once again tries to use the FCC’s pricing flexibility decisions to circumvent the Department’s criteria for determining when competition is sufficient to conclude that there is no longer a dominant carrier that can maintain prices above competitive levels. While Verizon offers no new reason for the Department to rely on the FCC’s cases to conclude that Verizon is non-dominant in the market for special access, it is worth recalling why the FCC decisions are not helpful under the Department’s precedent.

In its *Pricing Flexibility Order*, the FCC expressly declined to find the provision of loops and transport sufficiently competitive to consider the ILEC non-dominant in the provision of special access services. The FCC specifically stated: “Phase II [pricing flexibility] relief is not tantamount to non-dominant treatment.”²⁸ The Circuit Court for the District of Columbia relied upon that finding in affirming the FCC’s order, stating: “the FCC did not engage in the thorough

²⁵ *Verizon Testimony*, at 13.

²⁶ Tr. 131, 133, 5/28/02 (Umland, Holland, McFeely, Cannell).

²⁷ Tr. 134, 5/28/02 (Holland, McFeely, Cannell) (Verizon’s witnesses stated that they do not believe that the ability of a firm to set prices in a market consistently above the prices set by that firm’s competitors indicates market power).

competition analysis” that would be expected in “non-dominance proceedings.”²⁹ Rather, in granting pricing flexibility, the FCC decided that it would use a rote, mechanical test, not to determine market power, but only to identify emerging – but not yet established – competition, and allow ILECs the flexibility to respond to it.

In the recent *Special Access Notice of Proposed Rulemaking*, the FCC reaffirmed that the grant of pricing flexibility does not equate to a finding of non-dominance:

“In the *Pricing Flexibility Order*, the Commission permitted incumbents special access pricing flexibility upon satisfying certain competitive thresholds; at the same time, it did not go so far as to find that incumbents do not have market power with respect to these services.”

“We...note that the *Pricing Flexibility Order* does not grant incumbent LECs all the regulatory relief afforded to non-dominant carriers, that relief is limited to certain services and certain areas, and that incumbent LECs are still required to file generally available tariffs.”³⁰

Indeed, the case at bar provides hard evidence demonstrating that satisfaction of the FCC’s pricing flexibility criteria does not satisfy non-dominance criteria (the inability to sustain supra-competitive pricing). As Ms. Halloran explained on the record in this case and as restated below, when Verizon was granted pricing flexibility under the FCC’s rules, it *raised* its special access prices *above already inefficiently high levels*.³¹ Verizon’s ability to raise prices above

(continued...)

²⁸ *Pricing Flexibility Order*, ¶ 151, n. 372.

²⁹ See *WorldCom, Inc. v. FCC*, 238 F.3d 449, 460 (D.C. Cir. 2001).

³⁰ *Special Access Notice of Proposed Rulemaking*, FCC 01-339, at ¶14 and n.38 (November 19, 2001) (citing *Pricing Flexibility Order*, at ¶¶ 3 and 151).

³¹ That Verizon’s special access rates are inefficiently high is not in dispute. See *D.T.E. 01-31 Phase I Order*, at 61 (“CLECs that seek to provide services in competition with Verizon’s retail private line services incur economically-inefficient wholesale costs since the wholesale inputs (special access services) that CLECs purchase are not priced at incremental cost; rather, these inputs, because of historical universal service policies, are priced well above incremental cost.”)

already inefficiently high levels, even after a grant of pricing flexibility by the FCC, demonstrates conclusively that the test used by the FCC to award pricing flexibility does not measure whether “sufficient market forces are in place to ensure that carriers do not have an ability to raise prices to inefficient levels.”³²

Verizon did not and cannot contest Ms. Halloran’s testimony that in January 2002 Verizon raised its interstate special access prices in the areas for which it received pricing flexibility.³³ As explained by Ms. Halloran:

A price increase where the price is already the highest in the country in AT&T’s experience and where the on-time performance for DS1 circuits delivered at those high prices is the worst in class in AT&T’s experience, says to me that Verizon must have confidence that its volumes will hold even as a customer’s perceived value (price/performance) of the service decreases. I believe Verizon’s confidence in its ability to hold volumes is based in the knowledge that purchasers of special access have no viable alternative.³⁴

Verizon’s price increase upon receipt of pricing flexibility shows that the “‘competitive pressures’ which allowed Verizon to obtain pricing flexibility have not prompted Verizon to ‘reasonably price’ special access services.”³⁵

In summary, Verizon’s grant of pricing flexibility has absolutely no persuasive effect. First, the FCC itself has stated that a grant of pricing flexibility does not equate to the more rigorous finding of nondominance which Verizon, by implication, seeks here. Second, by raising its special access prices in areas where it has obtained pricing flexibility, Verizon itself has shown that pricing flexibility does not mean that the special access market is competitive or that Verizon lacks market power. Finally, the data produced by Verizon in this proceeding shows

³² *IntraLATA Competition Order*, at 56.

³³ *See Halloran Surrebuttal*, at 21.

³⁴ *See Halloran Surrebuttal*, at 21.

³⁵ *See Halloran Surrebuttal*, at 22.

that the grant of pricing flexibility has not improved Verizon's provisioning and maintenance performance.³⁶

C. The Record Evidence Demonstrates That Verizon Exerts Market Power Based On The Department's Established Criteria for Dominance.

The Department need not rely only on its prior determination to conclude that Verizon continues to enjoy the advantages of market power that require it to be regulated. AT&T adduced further evidence in this case confirming the Department's finding in D.T.E. 01-31. First, the Bull's Eye Chart attached to Ms. Halloran's direct testimony shows that that Verizon-North charges AT&T the highest price in the country for DS1 special access circuits at the same time that it provides the worst performance.³⁷ AT&T's witness Ms. Halloran presented conclusive evidence that, of the ILECs and Verizon-South, Verizon-North currently charges the highest price to AT&T for special access DS1 circuits.³⁸ During the years 2000 and 2001, Verizon-North also charged AT&T the highest special access prices of all ILECs and Verizon-South.³⁹ Verizon did not even attempt to refute this pricing evidence, nor could it. Contrary to Verizon's contentions, therefore, "competition" is hardly driving down Verizon's prices in Massachusetts or encouraging improved performance.

Second, and perhaps most compelling of all, is the evidence AT&T provided demonstrating that Verizon's competitors in the special access market expressly tie their prices to a discount off of Verizon's prices.⁴⁰ In other words, Verizon sets supra-competitive prices for

³⁶ See *Halloran Surrebuttal*, at 20-21.

³⁷ See *Halloran Direct*, Attachment C; DTE-ATT 1-7 (Halloran) (referencing Attachments B-1 and B-2 to DTE-ATT 1-4).

³⁸ See DTE-ATT 1-7 (referencing Attachments B-1 and B-2 to DTE-ATT 1-4).

³⁹ DTE-ATT 1-7 (referencing Attachment B-2 to DTE-ATT 1-4).

⁴⁰ DTE-ATT 1-11 (Halloran).

extended periods of time notwithstanding the presence of other carriers in the special access market. Simply stated, Verizon sets the prices in the special access market and sustains a price by contract that is higher than those charged by its competitors. There can be no clearer indicator of market power than that.

The ability to charge prices higher than one's competitors for a sustained period of time is exactly the type of evidence that the Department relies upon in deciding that a carrier is "dominant" and requires regulation to control its market power. In *AT&T NonDominance Petition*, D.P.U. 90-133 (January 2, 1991), the Department stated:

According to generally accepted economic theory, a firm with market power has the ability to raise prices without losing so many sales that the price increase is not profitable. Generally a firm with market power has the ability to set the prices for the market and, within a reasonable range, is not susceptible to a significant loss of its market share because of the long-term pricing practices of its competitors.⁴¹

The ability to sustain supra-competitive prices and thus earn monopoly profits requires regulation. In recognizing the importance of constraining supra-competitive pricing, the Department stated:

One of the purposes of regulation is to ensure that suppliers in regulated markets do not raise prices to extract monopoly profits or engage in predatory pricing to eliminate competition . . . Under regulation, market power is not as great a concern to the Department, since regulation takes the place of marketplace forces and limits the ability of a carrier to engage in such predatory pricing and cross subsidization practices.⁴²

In sum, the Department recognizes that regulation is necessary where a carrier engages in pricing that extracts monopoly profits from consumers. Verizon's exorbitant price of special access, which is sustained above the prices of special access circuits offered by competitors, clearly demonstrates that Verizon is a dominant carrier in need of regulatory constraint.

⁴¹ *D.P.U. 90-133*, at 36-37.

II. VERIZON’S PERFORMANCE DATA SHOWS PRONOUNCED AND SUSTAINED DISCRIMINATION AGAINST WHOLESALE CARRIER CUSTOMERS.

A. Wholesale Access Data Should Be Compared To Retail Non-Access Data Because Those Are the Circuits That CLECs And Verizon Use, Respectively, To Compete For the End-User.

During this proceeding, Verizon has been asked to provide “access” and “non-access” retail data. In order to make the appropriate comparison between Verizon’s provisioning to its retail customers and its provisioning to wholesale customers, it is important to have a clear definition of these terms – “access” and “non-access” as they relate to the retail data submitted by Verizon in this proceeding.⁴³

Verizon testified that the “defining difference” between access and non-access is the LATA boundary.⁴⁴ If the traffic riding a circuit stays within the LATA, the service is specified in the Verizon retail data as non-access.⁴⁵ This “local service...provided to end users” is referred to by Verizon as “special services, not special access, or sometimes private-line services,”⁴⁶ and is ordered out of the local exchange tariff, D.T.E. 10.⁴⁷ The access data, on the other hand, includes “services that were purchased to leave the LATA, such as in the DTE 15 tariff or the FCC 11 tariff.”⁴⁸ Designation by the customer of the Percent Interstate Usage (“PIU”)

(continued...)

⁴² *IntraLATA Competition Order*, at 55-56.

⁴³ Tr. 186, 5/29/02 (Evans).

⁴⁴ Tr. 189, 5/29/02 (Holland).

⁴⁵ Tr. 190, 5/29/02 (Holland).

⁴⁶ Tr. 48, 5/28/02 (Holland).

⁴⁷ Tr. 49, 5/28/02 (Holland).

⁴⁸ Tr. 47-48, 5/28/02 (Holland).

determines whether the access circuit is provisioned out of D.T.E. Tariff 15 or whether the circuit is provisioned out of FCC Tariff 11.⁴⁹

Verizon claims that a comparison of wholesale and retail must focus on like access services.⁵⁰ Verizon, however, fails to understand that it is the like *circuits* (the DS1s), not services, that must be compared.⁵¹ The DS1 circuit that Verizon uses to connect its end-user customer to the Verizon switch is the same underlying DS1 circuit which a carrier orders to connect its customer to an IXC POP. Over that same DS1 circuit, Verizon is providing a retail service provisioned under the intrastate tariff while the wholesale carrier is providing a retail service provisioned under the interstate tariff. Yet the services that Verizon and the wholesale carrier are providing to end-users are *competing* services. Therefore, in order to compare Verizon's provisioning of that same DS1 circuit to Verizon's retail customers versus Verizon's provisioning of the DS1 to wholesale carrier customers, the wholesale access circuits must be compared to the retail non-access circuits. As explained by Ms. Halloran with a diagram illustrating these identical DS1 circuits (Ex. ATT-9), a copy of which is attached to this brief, carriers ordering access services directly compete with Verizon's non-access services:

...if you look in the LATA, as you view it on the right, there's an end-user location, and Verizon will put a DS-1 in to that end user to the central office where Verizon's switch is, and Verizon, among other things, may sell them a switched service....

AT&T in that LATA might compete to take that business away from Verizon and offer our own switched service, local and long distance, using our switch, which is in the AT&T POP. So we would be competing for that customer's business from their premise. To get the DS-1, over which the winner will provide their service, AT&T has to order out of the interstate FCC tariff, and we've been calling at one point in this proceeding any DS-1 that went to a carrier was access.

⁴⁹ Tr. 191, 5/29/02 (Holland).

⁵⁰ Tr. 196-197, 5/29/02 (Holland).

⁵¹ Tr. 432, 5/30/02 (Halloran).

No matter who ordered it, if the DS-1 went to a carrier, it was access. So we have to order interstate.

Verizon, if they were competing for that business, that DS-1, provisions that under their intrastate tariff and calls it nonaccess.

So for that reason, I don't agree that you cannot compare access with nonaccess. I think you *have to* compare access with nonaccess. Because what we're after is, when we both need connectivity to the customer, and when that connectivity is a DS-1, are we disadvantaged -- is a customer disadvantaged by doing business with AT&T rather than going directly to Verizon?⁵²

Thus, Ms. Halloran's comparison of Verizon's provisioning of retail non-access circuits with Verizon's provisioning of wholesale access circuits is necessary in order to determine whether Verizon discriminates in its provisioning and maintenance of the same DS1 circuits.

B. Verizon's On-Time Performance Is Inferior and Its Intervals Offered and Completed Are Longer For Wholesale Carrier Customers Than For Verizon's Retail Customers.

1. The On-Time Performance Calculations and Interval Data Show That Verizon Discriminates Against Wholesale Carrier Customers.

The on-time performance calculations performed by Ms. Halloran using Verizon's data conclusively show that Verizon discriminates in its provisioning of circuits to wholesale carrier customers. Over a period of fifteen months, from January 2001 through March 2002, Verizon met its commitments to its retail customers 99.19% of the time, while it met the due date for wholesale carrier customers only 85.87% of the time.⁵³ For example, in April 2001, Verizon's on-time performance to its retail customers was 98.18%, while its on-time performance to its wholesale carrier customers was 77.81%.⁵⁴ Similarly, in July 2001, Verizon met its

⁵² Tr. 433-434, 5/30/02 (Halloran) (emphasis supplied).

⁵³ See *Halloran Surrebuttal*, at 13 (with updates provided at Tr. 369-371, 5/30/02 (Halloran)).

⁵⁴ See *Halloran Surrebuttal*, at 13.

commitments to retail customers 99.28% of the time, and only met its commitments to wholesale carrier customers 75.14% of the time.⁵⁵

Ms. Halloran arrived at these disparate percentages by using exactly the information that Verizon explained was necessary to calculate on-time performance:

The numerator would be the number of orders where the order completion date is on or before the order confirmed due date or completed after the confirmed due date due to customer reasons. That would be the numerator.

The denominator would be the number of orders completed for the product group. In this case it would be special access.

We do exclude the following: reporting carrier test orders, disconnect orders, reporting carrier administrative orders, record orders, and orders that are not complete.⁵⁶

Dividing the number of Verizon misses by the total circuits completed and subtracting that percentage from one, Ms. Halloran arrived at percent-on-time, which gives Verizon “on-time” credit for circuits not completed due to customer reasons.⁵⁷ These monthly percentages show that for at least the past fifteen months Verizon has consistently provided significantly better on-time performance to retail customers as compared to wholesale customers.

Verizon has not disputed the accuracy of these percentages. In fact, Verizon itself relies upon this on-time performance calculation to show that its service quality has improved in recent months.⁵⁸ But, despite the current improvement in service quality, which is likely the result of the exposure Verizon faced as a result of this proceeding, the systematic month-to-month disparity between the retail and wholesale percentages remains. As Verizon’s wholesale

⁵⁵ See *Halloran Surrebuttal*, at 13.

⁵⁶ Tr. 225, 5/29/02 (Holland).

⁵⁷ See *Halloran Direct*, at 9 and n.9.

⁵⁸ Tr. 262-264, 5/29/02 (Holland) (“As we had spoken earlier, on the on-time performance calculation, if one was to calculate the on-time performance using that criteria you would see a steady improvement over the period of time.”)

performance improved in recent months, so did Verizon's retail performance – to a consistent 100% on-time performance.⁵⁹ Verizon has offered no affirmative evidence that the disparity in the percentages is not the result of discrimination on the part of Verizon. In fact, except for the data requested by the Department and the parties, Verizon has provided no data in this proceeding at all,⁶⁰ and Verizon has not offered any evidence other than unsupported process arguments in an effort to explain away the discriminatory on-time percentages calculated by Ms. Halloran.

Likewise, Verizon only has offered statements about process to explain why the raw data on Verizon's offered and completed intervals should not be interpreted as a further illustration of Verizon's discriminatory behavior toward wholesale carrier customers. The monthly average intervals to wholesale carrier customers are significantly longer than the intervals Verizon provides to its retail customers.⁶¹ Looking at the aggregate fifteen months of data provided by Verizon in this proceeding, Verizon offered its retail customers an interval of 14.89 on average, yet offered its wholesale carrier customers an average interval of 35.42 days.⁶² The average offered interval is more than twice as long for wholesale carrier customers than retail customers. Similarly, Verizon's average completion interval to its retail customers was 18.03.⁶³ But for the wholesale carrier customers, Verizon's completion interval was 34.77 on average.⁶⁴ It takes Verizon on average almost twice as long to complete a wholesale order than to complete an order

⁵⁹ See *Halloran Surrebuttal*, at 13 (with updates provided at Tr. 369-371, 5/30/02 (Halloran)).

⁶⁰ Tr. 308, 5/30/02 (Sousa).

⁶¹ See DTE-VZ 5-1 (update of WCOM/ATT-VZ 1-18).

⁶² See *Halloran Surrebuttal*, at 11 (updated in Ex. ATT-7).

⁶³ See *Halloran Surrebuttal*, at 11 (updated in Ex. ATT-7).

⁶⁴ See *Halloran Surrebuttal*, at 11 (updated in Ex. ATT-7).

for its retail customer. This wide discrepancy in intervals to retail and wholesale customers severely hampers the ability of CLECs to compete for customers who desire special access services.⁶⁵

2. Verizon's Process Arguments Fail to Excuse the Large Disparity In Verizon's On-Time and Interval Performance to Retail and Wholesale Customers.

Verizon claims, without any documented evidence, that the on-time performance percentages calculated by Ms. Halloran and the raw interval data cannot be used to compare Verizon's performance to its retail customers versus its performance to wholesale carrier customers.⁶⁶ Verizon offers two reasons why the disparate wholesale / retail on-time percentages do not present an apples-to-apples comparison. First, Verizon points to situations where facilities must be constructed.⁶⁷ As will be explained below, however, Verizon's own evidence shows that facility builds have no effect on Verizon's on-time performance to wholesale carrier customers. Second, Verizon argues that the application dates for wholesale and retail customers occur at different points in the process, so that interval measurements based on application dates will not measure the same interval. As will be explained below, however, comparable points in the ordering process can be designated and, even after such designation, Verizon's intervals to wholesale carrier customers are still significantly longer than Verizon's intervals to its retail customers.

⁶⁵ See *Halloran Direct*, at 10 ("Companies which rely upon fast, reliable augments to their communications capacity (bandwidth) to conduct their business have told AT&T that they now consider where special access service is provided more reliably and more quickly"); Tr. 394, 5/30/02 (Halloran) ("...offered matters, because customers do order from more than one of us and whoever says they'll get there first might get the business...If there's a perception that you can get it sooner, it matters. On-time performance says you do get what's offered to you, so you do get it sooner.")

⁶⁶ Tr. 137, 5/28/02 (Holland).

⁶⁷ See *Verizon Testimony*, at 27-29; DTE-VZ 5-31, at 3-4.

a. Facility Builds Do Not Discredit the Discriminatory On-Time Performance Percentages.

Verizon attempts to explain the discriminatory on-time performance results by pointing to the timing of creation of the Service Order when facilities are *not* available.⁶⁸ Verizon therefore admits that the timing of the creation of the Service Order is the same in the wholesale and retail process when facilities do exist.⁶⁹

Focusing on the subset of orders where facilities must be constructed and which Verizon claims skews the on-time percentage against wholesale carriers, Verizon states that prior to June 2001, Verizon would not submit a Service Order until after the construction of facilities.⁷⁰ Verizon claims that this practice resulted in improved on-time performance percentages for retail customers because “Verizon is able to establish a due date later in the process based on more accurate information.”⁷¹ After June 2001, Verizon claims that it changed its practice.⁷² Enhancement of RequestNet allowed Verizon to input Service Orders prior to the construction of facilities and to give retail customers an estimated completion date just as Verizon provides to wholesale carrier customers on the FOC.⁷³ Thus, after June 2001, the ordering process for wholesale and retail customers was the same when facilities needed to be constructed.

Based on Verizon’s representations, one would assume that after June 2001, Verizon’s retail percent-on-time should have decreased given that Verizon is now estimating the completion date, just as it does for wholesale carrier customers. The data does not confirm

⁶⁸ *Verizon Testimony*, at 31.

⁶⁹ *See Halloran Surrebuttal*, at 14.

⁷⁰ Tr. 90, 5/28/02 (Holland).

⁷¹ *Verizon Testimony*, at 31.

⁷² DTE-V2 5-31, at 4.

⁷³ Tr. 90, 5/28/02 (Holland).

this assumption. Verizon's on-time performance after June 2001 only got better; in fact, it became perfect for the months of January, February and March 2002.⁷⁴

Verizon, however, continues to maintain that a retail/wholesale comparison cannot be performed because a sub-subset of orders which require construction of facilities are project builds.⁷⁵ Project builds for wholesale carrier customers "if anything...make[] the on-time performance better."⁷⁶ Moreover, Verizon has offered no evidence that project builds make any difference in the on-time performance calculation. Verizon could have easily sorted the wholesale orders by project ID to perform a calculation showing that project builds do in fact result in lower on-time performance for wholesale carrier customers.⁷⁷ Verizon offered no such evidence.

In addition, pursuant to Verizon's argument that the requirement to estimate a construction completion date on the FOC adversely affects Verizon's on-time performance to wholesale carriers, one would assume that Verizon's performance to wholesale carrier customers would greatly improve when facility builds are removed from the data for purposes of calculating the percent-on-time. Again, Verizon's own data disprove this assumption. Ms. Halloran calculated Verizon's on-time performance for wholesale carrier customers with facilities builds *omitted* (ATT-VZ 2-3B divided by ATT-VZ 2-3A) and compared those percentages with Verizon's on-time performance to wholesale carriers with facility builds

⁷⁴ See *Halloran Surrebuttal*, at 13 (with updates provided at Tr. 369-371, 5/30/02 (Halloran)).

⁷⁵ Tr. 90, 5/28/02 (Holland). See also DTE-V2 5-31, at 4.

⁷⁶ Tr. 430, 5/30/02 (Halloran).

⁷⁷ Tr. 430-31, 5/30/02 (Halloran) ("...it should be very easy to take project orders out of the results for retail and wholesale, and then we could see what's the impact of projects, are there more projects for retail than wholesale. But they should be noted in such a way for tracking that you could also take them out of the results and report results on time with and without projects in the mix, just like we looked at with and without facilities").

included (WC/ATT-VZ 1-4 divided by WC/ATT-VZ 1-3).⁷⁸ Ms. Halloran's calculations, contained in Ex. ATT-8, show that "there is no significant change in on-time performance when you exclude the impact of facility builds...."⁷⁹ In fact, when facility builds are excluded, the percent on-time is lower than when facility builds are included – a direct contradiction of Verizon's claim that facility builds adversely affect Verizon's on-time performance for wholesale carrier customers.⁸⁰

Thus, the data submitted by Verizon disprove Verizon's claim that facility builds somehow make the wholesale and retail on-time percentages an apples-to-oranges calculation. Moreover, Verizon offered no affirmative evidence to prove its facility builds allegation. Verizon only presented unsubstantiated argument. The Department, therefore, should reject Verizon's facility builds claim and should rely upon the unrebutted, on-time performance percentages presented by Ms. Halloran to find discriminatory provisioning by Verizon.

b. Differing Application Dates Do Not Invalidate the Discriminatory Intervals.

The interval data presented by Verizon in this proceeding "shows that from a clean ASR to the date offered...by Verizon, as well as the clean ASR to the date completed by Verizon, is a longer interval than a comparison of the retail process."⁸¹ Verizon claims that these longer intervals result from the earlier application date for wholesale carrier customers (the clean ASR) as opposed to the later application date for retail customers (the creation of Service Order).⁸² Yet, even when the interval data is adjusted to make the retail application date comparable to the

⁷⁸ Ms. Halloran used the updated data provided by Verizon in DTE-VZ 5-1.

⁷⁹ Tr. 375, 5/30/02 (Halloran).

⁸⁰ See Ex. ATT-8 (see "grand total").

⁸¹ Tr. 392, 5/30/02 (Halloran).

wholesale application date, the intervals offered and completed for retail customers are still much shorter than for wholesale carrier customers.⁸³

According to the identical functions illustrated on the Verizon ordering process flow charts, the difference between the application dates in the wholesale and retail processes can be measured or proxied using an overly conservative wholesale FOC interval.⁸⁴ The wholesale application date (the clean ASR) occurs prior to the RequestNet function in the ordering process.⁸⁵ The retail application date (creation of Service Order) occurs after the RequestNet function.⁸⁶ In order to arrive at equivalent application dates for purposes of comparable interval data, the time period between the retail request submitted to RequestNet and the retail Service Order must be added to Verizon's offered and completed interval results. This time period on the retail side is directly comparable to the time between a clean ASR and FOC on the wholesale side. Verizon states that the interval between a clean ASR and the FOC is five business days for DS0 and DS1 circuits.⁸⁷ Even adding a worst case seven business days to the DS1 retail intervals, Verizon's average intervals offered and completed are still much longer for wholesale carrier customers than retail customers.⁸⁸ Thus, even after the later retail application date is taken into account, the data still shows discriminatory behavior by Verizon.

(continued...)

⁸² *Verizon Testimony*, at 31.

⁸³ *See Halloran Surrebuttal*, at 5.

⁸⁴ *See Halloran Surrebuttal*, at 8.

⁸⁵ *See Wholesale Ordering Process Flow Chart attached to Verizon's Testimony.*

⁸⁶ *See Wholesale and Retail Ordering Process Flow Charts attached to Verizon's Testimony.*

⁸⁷ *See Wholesale Ordering Process Flow Chart attached to Verizon's Testimony.*

⁸⁸ *See Halloran Surrebuttal* at 9-11 (updated in Ex. ATT-7).

C. Verizon's Process Arguments Fail to Excuse the Large Disparity In Verizon's Installation Quality to Retail and Wholesale Customers.

Verizon's data show that, in the first thirty days of service, circuits installed for wholesale carrier customers fail at a rate that is significantly higher than the failure rate of circuits for retail customers.⁸⁹ Verizon does not dispute the percentages resulting from Ms. Halloran's calculations of installation quality or the fact that the percentages clearly show better performance for retail customers. Rather, even though Verizon states that the maintenance processes are "much more similar" between retail and wholesale,⁹⁰ Verizon again claims that differences in the wholesale and retail processes skew the data in favor of retail end users and therefore explain the discriminatory results.⁹¹ Based on Verizon's own data, however, these alleged process differences do not explain the disparate installation quality between retail and wholesale customers. Moreover, as with the claims of process differences affecting Verizon's on-time performance and intervals to wholesale carrier customers, Verizon offers absolutely no evidence to support its alleged differences in the maintenance process.

After having remained silent in the face of compelling statistical evidence of maintenance discrimination throughout this case, in a last ditch, desperate effort, Verizon offered at the hearings for the first time two "process" differences to explain the discriminatory installation quality results – (1) for as long as the retail customer's service order is not complete, Verizon will correct a trouble without recording an installation failure;⁹² and (2) the retail data includes

⁸⁹ See *Halloran Surrebuttal*, at 18; RR-AG-1 (Halloran).

⁹⁰ Tr. 268, 5/29/02 (Holland).

⁹¹ Tr. 269, 5/29/02 (Holland).

⁹² Tr. 272, 5/29/02 (Holland).

circuits with test-okays, no-troubles-found and CPE, while the wholesale data omits those circuits.⁹³

The first alleged difference has absolutely no effect on the calculations provided by Ms. Halloran. As Ms. Halloran explained:

...the wholesale and retail maintenance process, just as described by Verizon is exactly comparable...[F]or retail, if the service order has not been completed in the systems by Verizon, [] the retail customer will call the provisioning center if there is a trouble. That is the same for wholesale. If the order is still open, we call the provisioning center for a trouble.⁹⁴

Thus, no maintenance process difference exists between wholesale and retail customers and, therefore, Verizon's claim that this discrepancy regarding I-reports somehow justifies the lopsided quality percentages is incorrect.

Verizon's second alleged difference is a reporting difference, not a process difference. Verizon claims that, for wholesale carrier customers, Verizon provided the number of installation trouble reports, but excluded from that number the test-okays, no-troubles-found and CPE. For retail customers, Verizon claims that the installation trouble reports include the test-okays, no-troubles-found and CPE. Verizon therefore states that a comparison of wholesale and retail cannot be made.⁹⁵ Verizon's alleged reporting of the retail data directly contradicts the explicit instructions given by WorldCom and AT&T in the information requests seeking the number of installation trouble reports.⁹⁶ In both the first and second set of information requests to Verizon, WorldCom and AT&T specifically defined "installation trouble report" as a "trouble report

⁹³ Tr. 276, 5/29/02 (Holland).

⁹⁴ Tr. 379, 5/30/02 (Halloran).

⁹⁵ Tr. 276, 5/29/02 (Holland).

⁹⁶ WCOM/ATT-VZ 1-22 and WCOM/ATT-VZ 2-3(b).

where a trouble was found *in Verizon's network* within 30 days of order completion.”⁹⁷

WorldCom and AT&T therefore specifically requested that Verizon provide wholesale and retail installation trouble reports that excluded test-okays, no-troubles-found and CPE. According to the parameters of the requests to Verizon, the wholesale and retail data reported by Verizon only reflected troubles found in the Verizon network. Verizon offered no testimony stating that the instructions to information requests were not followed in its report of installation troubles.

Rather, Verizon simply makes the statement that, for its *internal* purposes, Verizon includes test-okays, no-troubles-found and CPE in its measure of retail installation trouble reports.⁹⁸ Verizon, however, does not state that the data provided in response to the information requests seeking installation trouble reports do not conform to the very specific requirement that only troubles within the Verizon network should be included. Verizon therefore has offered no evidence to discredit the comparison of the wholesale and retail installation quality that Ms. Halloran performed using the data submitted by Verizon in response to WCOM/ATT-VZ 1-22 and WCOM/ATT-VZ 2-3(b) (updated in DTE-VZ 5-1).

D. Verizon's List of Miscellaneous Process Differences Fails to Explain the Discriminatory Results.

In addition to the few specific process differences to which Verizon refers, but does not support, in an attempt to rationalize the discriminatory results presented by Ms. Halloran, Verizon points to a mishmash of “characteristics of special access circuits, process differences and underlying network conditions.”⁹⁹ Verizon, however, does not state or even imply how these characteristics and “differences” tend to affect positively Verizon's provisioning of special

⁹⁷ Ex. ATT-3 (First Set of Information Requests to Verizon); Ex. ATT-5 (Second Set of Information Requests to Verizon) (emphasis added).

⁹⁸ Tr. 276, 5/29/02 (Holland).

access circuits to retail customers and to impact negatively Verizon provisioning to wholesale carrier customers. For example, Verizon's citation of "the complexity of different specific special access orders" does not in any way indicate why Verizon is justified in offering better on-time performance to its retail customers than to its wholesale carrier customers.¹⁰⁰ Both retail and wholesale customers order complex services and would be affected in the same way by this characteristic of a special access circuit. Likewise, "different specific locations of the circuit(s) requested" and "different time during which orders are placed (seasonal or cyclical industry demand fluctuations affect installation performance)" similarly influence Verizon's provisioning and maintenance of wholesale and retail circuits.¹⁰¹ Verizon has not shown that either retail or wholesale customers are more affected by circuit locations or ordering times. Thus, these characteristics are irrelevant to the discriminatory results. The remaining characteristics of special access circuits listed by Verizon are similarly indigenous to circuits ordered for both wholesale and retail customers. The listed characteristics, therefore, do not explain why Verizon's provisioning and maintenance performance is better for retail customers than for wholesale customers.

III. AS THE DOMINANT CARRIER IN THE SPECIAL ACCESS MARKET, VERIZON MUST BE REGULATED TO REMEDY ITS DISCRIMINATORY PROVISIONING OF SPECIAL ACCESS CIRCUITS.

The discriminatory provisioning described above requires aggressive Department regulation of Verizon so that this dominant provider of special access circuits cannot continue to

(continued...)

⁹⁹ DTE-VZ 5-31, at 4-5.

¹⁰⁰ DTE-VZ 5-31, at 4.

¹⁰¹ DTE-VZ 5-31, at 4-5.

impede competition in the retail markets that rely on special access circuits. Regulation of Verizon should take three distinct forms. First, standards and metrics should be instituted, so that further comparisons of Verizon's provisioning and maintenance performance to retail customers, Verizon's affiliates, and wholesale customers can be made, and the full extent of Verizon's discriminatory practices exposed. Second, Verizon must face financial disincentives to discourage discriminatory provisioning and maintenance, both for intrastate and interstate circuits. Finally, the Department should investigate and require changes, so that wholesale carrier customers receive service quality similar to Verizon's retail customers. By regulating Verizon in these ways, the Department can force Verizon to improve its service quality to wholesale carrier customers and improve the state of retail competition in Massachusetts.

A. The Department Should Establish Metrics and Standards to Measure Verizon's Intrastate and Interstate Performance.

In order to monitor Verizon's performance, as well as to create an incentive for Verizon to reduce the extent of its discrimination in provisioning and maintenance, the Department should require Verizon to report its intrastate and interstate special access provisioning and maintenance performance. Because Verizon's provisioning of special access to wholesale carrier customers has been proven to be "unjust, unreasonable, unsafe, improper [and] inadequate", the Department has the authority pursuant to G.L. 159, § 16, to require Verizon to adopt "just, reasonable, safe, adequate and proper regulations and practices." This authority includes requiring Verizon to report its performance in provisioning and maintaining intrastate circuits as well interstate circuits.

In order to determine "unjust, unreasonable, unsafe, improper or inadequate" performance by Verizon in Massachusetts, the Department must consider Verizon's performance to retail customers in comparison with Verizon's performance to wholesale carrier customers. Over 99 percent of the special access circuits that Verizon provisions to wholesale carrier

customers are currently purchased under the federal tariff.¹⁰² Verizon, however, provisions these federal circuits in the same way and through the same CATCs as intrastate circuits.¹⁰³ In order to compare Verizon's performance to retail and wholesale customers, and to fulfill the Department's obligation to remedy unjust practices, the Department requires information on Verizon's provisioning of interstate circuits to wholesale carrier customers. Only by requiring Verizon to report both its intrastate and interstate performance can the Department observe and evaluate Verizon's discriminatory behavior.

The Supreme Court of the United States made just this finding in *Federal Power Corp. v. Conway Corp.*, 426 U.S. 271 (1976). The Court determined that the Federal Power Commission had jurisdiction to consider allegations of a power company's wholesale customers that the proposed wholesale rates, which were within the Commission's jurisdiction, were discriminatory and non-competitive in relation to the power company's retail rates, which were not within the jurisdiction of the Commission.¹⁰⁴ The Court specifically rejected as "untenable" the Commission's argument that it may not consider any alleged discrimination "resting on a difference between jurisdictional and nonjurisdictional rates."¹⁰⁵ The Court determined that, "[a] jurisdictional sale is necessarily implicated in any charge that the difference between wholesale and retail rates is unreasonable or anti-competitive."¹⁰⁶ In the same way, Verizon's service performance to its retail customers is integral to the state jurisdictional complaints of wholesale

¹⁰² DTE-V2 2-1 (Bisognano).

¹⁰³ See Tr. 51-52, 5/28/02 (Holland) (Before sending an ASR to the McFeeley CATC, a carrier designates on the ASR whether the PIU is 0, "meaning it was intrastate and crossed the LATA boundary, which would be DTE 15, or it would be 100, meaning it was interstate traffic, and therefore would be purchased out of the FCC 11"); see also *Order on AT&T Motion to Expand Investigation*, D.T.E. 01-34 (August 9, 2001), at 12.

¹⁰⁴ *Federal Power Corp.*, 426 U.S. 271, 272-73 (1976).

¹⁰⁵ *Federal Power Corp.*, 426 U.S. at 277.

¹⁰⁶ *Federal Power Corp.*, 426 U.S. at 272-73.

carrier customers that Verizon discriminates in its state jurisdictional transactions by offering faster and more reliable circuits to its retail customers than its wholesale carrier customers. For just this reason, the NYPSC required Verizon to provide service quality information about all special services, including circuits provisioned under the interstate tariff.¹⁰⁷ Verizon itself recognizes the need for interstate reporting by its agreement voluntarily to report to the New Hampshire Public Utilities Commission intrastate and interstate data similar to that required by the NYPSC metrics.¹⁰⁸

The special access metrics and standards instituted in New York provide an appropriate and comprehensive set of standards under which Verizon already reports.¹⁰⁹ The difficulty in obtaining accurate and timely information from Verizon in this proceeding,¹¹⁰ as well as inconsistencies in what should be included and excluded from data calculations,¹¹¹ necessitate

¹⁰⁷ NYPSC December 20, 2001, Order, at 9 (citing in n.8: *Conway Corp.*, 426 U.S. at 277, 280 (an agency has authority to consider the entire “factual context in which the proposed” rate functions); *Matter of New York Telephone Company v. Public Service Comm’n*, 95 NY2d 40 (2000); and *Arkansas Louisiana Gas Co. v. Dept. of Public Utilities*, 304 U.S. 61 (1938) (state order requiring provision of information does not interfere with interstate commerce)).

¹⁰⁸ See DTE-VZ 5-60 (Stipulation Regarding Carrier-to-Carrier Guidelines Applicable to Verizon New Hampshire, DT 01-006 (February 5, 2002)).

¹⁰⁹ See *Halloran Direct*, at 17-18. In addition, Verizon has been reporting special access service results, similar to those required in New York, on a monthly basis in New Hampshire since December 27, 2001 and in Maine since March 28, 2002. See RR-ATT-VZ-9 (Holland).

¹¹⁰ See e.g. *Hearing Officer Ruling on Opposition of AT&T To Verizon’s Proposed Delay of Hearings Until May 28-30, 2002*, D.T.E. 01-34 (April 11, 2002) (“Regarding the accuracy of discovery responses, problems still remain. The Department has been frustrated by discovery responses that are less than fully responsive and complete. Verizon’s less than complete answers have caused the Department to issue the same questions more than once; in some instances we have yet to receive a responsive answer to our questions. In other instances, when Verizon has provided data, it has been difficult to decipher exactly what has been provided. Verizon has submitted data charts without headings; charts without adequate explanation as to what they contain. Verizon has substituted responses and filed erratas without any identification or explanation as to what had changed from previous filings. At times, data filed do not add up from response to response, or are inconsistent.”) (footnotes omitted).

¹¹¹ Tr. 207-208, 5/29/02 (Holland) (Calculating ASR’s FOC’d can be done in a number of ways demonstrating “the complexity when trying to determine what to measure and how to measure it...It gets very complex what you include, exclude. The business rules associated with that have to be well documented and understood, in order to understand what the measurement really entails”).

implementation of standardized, monthly reporting obligations on Verizon. The New York metrics appropriately “take into account the need to compare the quality of service that Verizon provides in provisioning and maintaining circuits to itself and its retail customers, versus its provisioning and maintaining of special access to CLECs.”¹¹² With the information reported by Verizon pursuant to these metrics, “the Department can be alert to service deterioration and can act quickly to understand its cause and ensure corrective action.”¹¹³

A slight but discernable improvement in Verizon’s provisioning and maintenance of special access circuits in Massachusetts already has occurred as a result of Verizon’s reporting of data in response to this proceeding.¹¹⁴ Regular reporting requirements are necessary, although not sufficient, to maintain this improved performance.¹¹⁵

B. The Department Should Institute a Performance Assurance Plan (With Financial Penalties) To Remedy Verizon’s Discriminatory Provisioning of Intrastate and Interstate Special Access Circuits.

1. The Department Should Institute a Performance Assurance Plan To Regulate Verizon’s Provisioning of Intrastate Circuits.

In order to remedy Verizon’s discriminatory provisioning, the Department should institute a Special Access Performance Assurance Plan that includes adequate and rigorous self-executing enforcement mechanisms tied to Verizon’s failures to meet performance standards. The Department’s authority to institute such a plan derives from G.L. c. 159, § 16. The Department has utilized this authority in the past to require financial penalties for poor performance in the delivery of monopoly services. In D.P.U. 94-50, the Department instituted

¹¹² *Halloran Direct*, at 16.

¹¹³ *Halloran Direct*, at 17.

¹¹⁴ *See Halloran Direct*, at 8.

¹¹⁵ *Halloran Direct*, at 8.

the “Service Quality Plan” in conjunction with the Price Cap form of regulation so that Verizon (then NYNEX) could not “increase profits by reducing service quality for captive customers. [Such a] reduction in service quality would be tantamount to a price increase.”¹¹⁶ Verizon, in fact, recommended to the Department in the Alternative Regulation Plan presented in D.T.E. 01-31 that the Department continue to use the “Service Quality Plan” adopted in D.P.U. 94-50 to “ensure that if Verizon MA’s service falls below the long-standing Department threshold for appropriate service quality, Verizon MA will pay a penalty.”¹¹⁷

The Department should adopt a similarly detailed and stringent service quality plan in this proceeding. Any Special Access PAP should include the following mechanisms: substantial financial penalties, annual reviews, and annual audits by an independent third party. In addition, for every six months in which data reported shows discrimination, Verizon should be required to provide a detailed analysis of why the discrimination occurred and how Verizon plans to remedy the discrimination. In establishing these mechanisms, the goals of a Special Access PAP should be: (1) to establish a regime that minimizes the need for time-consuming and expensive litigation; and (2) to create incentives that make Verizon, as a rational, profit-maximizing entity, actually want to provide appropriate levels of service to wholesale carrier customers. To accomplish the second of these goals, financial penalties established by the Department in a Special Access PAP must be based on an empirical analysis of the amount of money necessary to deter discriminatory conduct in Verizon’s provisioning of special access circuits. In other words, penalties should be large enough that Verizon cannot consider the payments simply a cost of doing business to maintain its monopoly power in Massachusetts. Moreover, payment of

¹¹⁶ *D.P.U. 94-50*, at 235-36.

¹¹⁷ *Massachusetts Alternative Regulation Plan*, D.T.E. 01-31 (April 12, 2001), at Appendix B; *Direct Testimony of Robert Mudge*, D.T.E. 01-31 (April 12, 2001), at 21.

penalties should be required as self executing bill credits so that a significant amount of time does not divide Verizon's poor performance and the payment of penalties for that performance.

By way of example, the following separate and independent penalties likely would be effective deterrents to Verizon's poor on-time, interval and maintenance performance: require Verizon to (1) provide the wholesale carrier with a three percent credit on the total monthly recurring charges for all of that carrier's special access services if Verizon misses the due date performance standard; (2) provide the wholesale carrier with a three percent credit on the total monthly recurring charges for all of that carrier's special access services if Verizon completes orders for wholesale carrier customers at an average interval longer than the retail average completed interval for that month; and (3) provide the wholesale carrier with a three percent credit on the total monthly recurring charges for all of that carrier's special access services when installation quality is worse for wholesale than retail. If the Department believes more evidence is necessary to determine the amount of penalties sufficient to deter anti-competitive conduct by Verizon, it would be appropriate to address these penalties in Phase II where suitable remedies (such as root cause analysis) will be investigated pursuant to a finding of Verizon liability in this proceeding.

A Special Access PAP remedying Verizon's intrastate service deficiencies will have a beneficial effect on Verizon's provisioning and maintenance performance at the interstate level and therefore also will benefit overall competition in Massachusetts.¹¹⁸ Because the Verizon CATCs do not distinguish between a wholesale carrier's interstate and intrastate order, any improvements which Verizon makes as a result of subjection to a Special Access PAP will likely

¹¹⁸ See *Halloran Direct*, at 20.

improve both intrastate and interstate provisioning and maintenance performance. Moreover, as explained by Ms. Halloran:

[T]he Department has a strong interest in encouraging improved and non-discriminatory provisioning and maintenance performance of both intrastate and interstate circuits. Correcting the process for intrastate circuits will have an important beneficial impact on state interests for three reasons: (1) intrastate circuits in and of themselves are very important to state economic development; (2) remedying the inadequacies of the process for intrastate circuits will have the incidental effect of correcting the process for interstate circuits which are even more important for state economic development; and (3) per the Verizon data provided, more business service reliant upon DS1 circuits from Verizon is provided in Massachusetts via interstate tariffs than intrastate tariffs.¹¹⁹

Thus, a Special Access PAP will help to prevent Verizon from continuing to exert its dominance in the special access market.

2. Evidence Obtained During the Hearings Shows That the Department Has Authority to Remedy Verizon's Discrimination Against Wholesale Carriers in the Provisioning of Interstate Special Access Circuits.

Because of the competitive impact of the Massachusetts circuits carrying at least ten percent interstate traffic, the Special Access PAP should apply to and remedy Verizon's poor performance in provisioning and maintaining special access circuits provisioned under the interstate tariff. As explained at the hearings and in Section II.A. above, Verizon's private line services, provisioned under the intrastate tariff, directly compete with wholesale carriers' special access circuits, provisioned under the interstate tariff as a result of the FCC's ten percent rule.¹²⁰ Thus, both Verizon and the wholesale carrier customer are competing to use the same underlying DS1 circuitry to provide service to the same Massachusetts customer.¹²¹ Verizon should not be

¹¹⁹ See *Halloran Direct*, at 21.

¹²⁰ Tr. 433-34 (Halloran). See also Ex. ATT-9.

¹²¹ Tr. 433-34 (Halloran) See also Ex. ATT-9.

allowed to use jurisdictional distinctions to circumvent state rules against discrimination, especially when the jurisdictional and nonjurisdictional services ride the exact same Massachusetts circuit.

C. The Department Should Perform a Root Cause Analysis To Determine and Ultimately Institute Process Improvements.

Another means of correcting Verizon's discriminatory behavior is Department investigation and improvement of the processes by which Verizon provisions retail and wholesale intrastate circuits. Such investigation and remedies are clearly contemplated by the Department's authority to remedy unjust practices under G.L. c. 159, § 16. As explained above, correction of Verizon's intrastate process will have a twofold beneficial impact on competition in Massachusetts. First, Verizon's provisioning and maintenance of intrastate circuits will improve. Second, because the processes and CATCs by which Verizon provisions intrastate circuits are exactly the same as the processes and CATCs that provision and maintain interstate circuits, Verizon's service quality on interstate circuits will also indirectly benefit.

Ms. Halloran through her pre-filed and oral testimony has suggested a variety of process improvements that the Department can investigate and require in order to remedy Verizon's discriminatory performance. Ms. Halloran specifically focused on the Verizon ordering and provisioning flow charts and "the manual steps and the decisions of people, humans, along the way...[that must] be examined for root cause and...would explain why the results are better at retail than at wholesale."¹²²

¹²² Tr. 381, 5/30/02 (Halloran). *See also* Tr. 325, 5/30/02 (Holland) ("Retail is a much more manual process...")

One of these “manual steps” that Verizon agents perform, but that wholesale carrier customers cannot, is query RequestNet on behalf of a retail customer.¹²³ Electronic, real-time access to RequestNet gives retail agents the ability instantaneously to inform their customers that facilities are or are not available; carriers, however, do not have this same information until they receive a FOC five days after submission of a clean ASR. Verizon’s real-time access to RequestNet provides Verizon with a distinct advantage in serving its retail customers and may help to explain the better on-time performance Verizon gives its own customers as opposed to wholesale carrier customers.¹²⁴ Verizon can instantaneously inform its customers that facilities are available and immediately can submit a Service Order for that customer, beginning the provisioning process. A Department requirement that Verizon allow carriers the same access to RequestNet prior to submitting an order (namely, prior to sending the ASR) will give carriers “the same knowledge that facilities are available at the same time as a Verizon retail agent.”¹²⁵ In that way, carriers can know “within minutes” and will not have to wait five days for a FOC and for the CATC to create a service order when facilities are available.¹²⁶

Ms. Halloran also suggested that Verizon should be required to institute methods and procedures requiring CATC agents, when possible, to give carriers the due date requested (the CDDD) instead of the later due date automatically calculated by RequestNet. As explained by Ms. Halloran:

¹²³ Tr. 489, 5/30/02 (Halloran); *see also* DTE-V2 4-21 (Cannell) (“the check for facilities availability for a retail special service customer is made prior to an order being entered through a service request or SR in the RequestNet system”).

¹²⁴ Tr. 489-90, 5/30/02 (Halloran); *Halloran Surrebuttal*, at 17.

¹²⁵ Tr. 489-90, 5/30/02 (Halloran).

¹²⁶ Tr. 489-90 (Halloran).

On the wholesale side RequestNet adds six business days to whatever facility-availability date it determines when it goes through its process. Th[e] CATC agent has the ability, it's my understanding, to change that output from RequestNet...If there were an instruction that says, whenever you can, let's give them the due date that they ask for, and if you need to make AT&T supp. it to indicate an expedite and they'll pay for it, do that....

But that doesn't happen. And not only does that not happen, that the CATC agent doesn't, in my experience, my knowledge of this, strive to meet that CDDD whenever they can; it's my understanding that Verizon also in the CATC -- and I don't know this to be true for retail -- that the CATC agent will look at a...manual list that says on the due date that RequestNet just gave you, facilities available plus six days, we've already looked at some force-to-load figure, we Verizon, and there's already 100 numbers -- I'm making up that number. 100 is the threshold. That CATC agent may say, "I'd better give them the next day or the next two days.

So what comes through here, then, becomes the judgment of an agent in the CATC on a particular day; and I don't know of anything similar that happens at retail, and if it does, again, it's the experience, it's the inclination of the agent what to do with that order.¹²⁷

This example provides a concrete reason why the human judgment of Verizon agents who provision orders to wholesale carrier customers must be subjected to methods and procedures requiring the provision of a certain level of service. Further root cause analysis will reveal other areas where retail and wholesale policy directives are dissimilar, and where it would be beneficial to apply "best practices from retail...to wholesale."¹²⁸

These two suggestions by Ms. Halloran are only the tip of what most likely is a very large iceberg. Indeed, if process and/or policy differences are in any way responsible for the significant discrepancies between retail and wholesale performance, then this is an argument for fixing the processes on the wholesale side so that they produce the same level of performance as

¹²⁷ Tr. 389-390, 5/30/02 (Halloran).

¹²⁸ See *Halloran Surrebuttal*, at 18.

on the retail side. A Phase II investigation by the Department into the root causes of Verizon's discriminatory performance is required in order to evaluate additional appropriate remedies.¹²⁹

D. Like the NYPSC, the Department Should Ask the FCC To Delegate to the Department Authority To Regulate Interstate Access Provisioning and Maintenance.

Seeking authority from the FCC to regulate Verizon's interstate special access performance is another method by which the Department can remedy Verizon's clear discrimination against wholesale carrier customers. The NYPSC requested this type of authority from the FCC following the NYPSC's investigation and determination that Verizon discriminates in its provisioning of special access circuits in New York.¹³⁰ FCC delegation of authority to regulate interstate services would allow the Department to establish and enforce service standards for all special access circuits provisioned by Verizon in Massachusetts.

E. Removal of the UNE Restrictions Will Allow Carriers to Order As UNEs the Same Circuits at Issue in This Proceeding, Thereby Obviating the Need for Special Access Performance Monitoring and Enforcement.

The most efficient way for the Department to cure Verizon's current and persistent special access performance problems is to eliminate Verizon's artificial UNE/EELs use restrictions and Verizon's "no facilities" barriers. These restrictions force CLECs to use special access circuits to provision bundled local and long distance service. By eliminating Verizon's UNE restrictions, the Department would in large part obviate the need for special access performance monitoring and enforcement. Expanded use of UNEs/EELs in Massachusetts would place competitors on an equal footing with Verizon and would allow the Department to

¹²⁹ See *Halloran Direct*, at 21-22.

¹³⁰ See Letter from Maureen O. Helmer, Chairman NYPSC, to Michael K. Powell, Chairman FCC (May 22, 2001) (a copy of which is attached to this brief).

ensure adequate provisioning and maintenance performance by Verizon in the Massachusetts local exchange marketplace.

AT&T understands that the record in this proceeding has not been fully developed on Verizon's use of UNE restrictions to prevent competition. AT&T will provide in Phase II of D.T.E. 01-31 the legal and factual considerations relating to the removal of Verizon's UNE restrictions, including the authority of the Department to do so, and the detrimental effect on competition and retail rates in Massachusetts that result from leaving those restrictions in place.

As Ms. Halloran explained and as will be demonstrated by AT&T in Phase II of D.T.E. 01-31, in order to facilitate CLEC use of UNEs, the Department should alter the language in D.T.E. Tariff 17: (1) by eliminating Section B.13.1.1.D, which codifies the onerous usage restrictions, and (2) by modifying Section B.13.1.1.A as follows:

EEL arrangements are provided to the extent technically feasible ~~and where facilities exist~~. EEL arrangements enable a CLEC to use combinations of unbundled links (provided under Part B, Section 5) and unbundled dedicated interoffice transport network elements, including unbundled multiplexers (provided under Part B, Sections 2 and 3) to provide ~~a significant amount of local exchange~~ **any telecommunications** service to an end user.¹³¹

Altering D.T.E. Tariff 17 in this way would allow wholesale carriers to switch their special access services to UNEs which are subject to the Massachusetts PAP. Thus, facing the penalties for poor performance under the PAP, Verizon will have financial incentives to remedy the poor provisioning and maintenance performance Verizon provides to wholesale carrier customers.

Another means by which the Department can facilitate expanded use of UNEs, and which will be explained in the D.T.E. Phase II proceeding, is elimination of Verizon's policy of refusing to fill a CLEC order for a UNE in situations where "facilities are not available" per

¹³¹ See Halloran Direct, at 15-16.

Verizon's overbroad definition of "facilities not available." For example, Verizon's policy includes a directive that Verizon will not place a new multiplexer in a building specifically to provision UNE orders, even though the DS1 circuit is available and there is spare fiber to the building.

If Verizon is allowed to continue its policies of restricting UNEs by its use restrictions and "no facilities" barriers, "AT&T and other CLECs will continue to be forced to purchase circuits out of the special access tariffs and Verizon will maintain an unwarranted competitive advantage over CLECs as a result of above-cost pricing of special access."¹³²

As demonstrated in its June 5, 2002, Compliance Filing in D.T.E. 01-31, Verizon is gravely concerned about losing the ability to charge above-cost prices for special access and losing its resulting advantage in the downstream retail markets.¹³³ After the Department required Verizon to reduce intrastate special access services to UNE levels in order to further the Department's goals of competition, consumer protection, and innovation in the market,¹³⁴ Verizon stated that it would withdraw its request for pricing flexibility for private line services so that Verizon can maintain its inflated intrastate special access charges.¹³⁵ Verizon's statement is indeed a dramatic illustration of the advantages it enjoys in downstream retail markets from controlling the price and performance of special access circuits at the wholesale level. Verizon has concluded that it prefers to remain price regulated in retail markets that rely on special access circuits as inputs, rather than compete at retail with carriers that face the same costs for special access circuits that Verizon does. Stated another way, the only way a grant of pricing flexibility

¹³² *Halloran Direct*, at 19.

¹³³ Verizon Compliance Filing, D.T.E. 01-31 (June 5, 2002), at 3-4.

¹³⁴ *D.T.E. 01-31 Phase I Order*, at 62.

¹³⁵ Verizon Compliance Filing, D.T.E. 01-31 (June 5, 2002), at 3-4.

will satisfy Verizon is if the grant will allow Verizon to increase its retail rates and allow Verizon to continue to charge its competitors more than the cost that Verizon incurs for the network facilities necessary to compete. Elimination of UNE/EELs use restrictions and “no facilities” barriers will prevent Verizon from impeding competition in the special access market by forcing wholesale carriers to rely on poorly provisioned, and what Verizon hopes to maintain as above-cost, special access circuits.

If, contrary to AT&T’s recommendation in this proceeding and in D.T.E. 01-31, the Department were to decide that Verizon should be allowed to continue enforcing some type of UNE use restrictions, AT&T will present in Phase II of D.T.E. 01-31 evidence showing that changes are necessary so that new UNE use restrictions – unlike the present restrictions – could be satisfied by carriers from a technical point of view and carriers will not be prevented from converting their special access circuits to UNEs.

CONCLUSION.

For the reasons set forth above, the Department should find that (1) Verizon has provided no evidence to support a conclusion that it is not a dominant provider of special access circuits; (2) given Verizon’s position as a dominant provider of special access circuits, competition is not adequate to discipline Verizon’s provisioning and maintenance performance; and (3) Verizon discriminates against wholesale carrier customers in provisioning and maintaining special access circuits.

The Department, therefore, should order that: (a) Verizon report its intrastate and interstate performance under the special access standards and metrics instituted by the NYPSC with the modifications discussed in Ms. Halloran’s direct testimony and illustrated in the

attached revision of the New York Percent On Time ASR Response metric;¹³⁶ (b) Verizon should be subjected to a PAP for special access circuits with sufficiently large disincentives to ensure quality service, including financial penalties where Verizon's wholesale performance is not at parity with retail and/or Verizon fails to meet set specific performance and maintenance standards (for example, parity but not less than 95% on-time performance); and (c) an expedited Phase II of this proceeding shall commence to conduct a root cause analysis for purposes of requiring Verizon to make improvements in its special access service quality.

Respectfully submitted,

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¹³⁶ See *Halloran Direct*, at 17, n.12.

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